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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1260

JAMES JAY KAPLAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

H. CLIFFORD ALLDER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No.

JAMES JAY KAPLAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner prays that a Writ of Certiorari be issued to reverse the judgments of the District of Columbia Court of Appeals entered on the above entitled case on May 10, 1971 and November 21, 1973.

OPINIONS BELOW

The Opinions of the District of Columbia Court of Appeals were decided on May 10, 1971 and November

21, 1973. Copies of the Opinions of the District of Columbia Court of Appeals are attached hereto and prayed to be taken as a part hereof, marked as appendix No. 1 and 2.

JURISDICTION

The judgments of the District of Columbia Court of Appeals were rendered on the 10th day of May 1971 and the 21st day of November 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Court err in denying the Petitioner's Motion to Supress which is predicated upon the failure of the government to have given the Petitioner an adversary hearing prior to the issuance of the search warrant?
2. Did the Court err in not dismissing the case when the government failed to offer any evidence concerning the National Community Standard?
3. Did the Court err in not finding the statute in question unconstitutionally vague and over-broad when viewed in light of *Miller v. California,* 37 L.Ed 419, as directed to by this Court when it granted the writ for certiorari and remanded the case for further consideration?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

Constitutional Provision:

Amendment 1;

> Congress shall make no law * * * abridging the freedom of speech.

Statute Involved:

Title 22, Sec. 20001 District of Columbia Code. It shall be unlawful in the District of Columbia for a person knowingly–(B) to present, direct, act in or otherwise participate in the preparation or presentation of, any obscene, indecent, or filthy play, dance, motion picture, or other performance.

STATEMENT

The petitioner, James Jay Kaplan, was charged with having violated Title 22, Sec. 2001 (a)(1)(B), of the District of Columbia Code, 1967 edition, as amended by Supplement II, 1969. The pertinent part of this statute concerns the showing of an alleged obscene film. The petitioner prior to trial filed a Motion to Suppress because of the lack of an adversary hearing prior to the issuance of the search warrant. This Motion was denied.

The Trial consisted of one witness, a policeman who seized the film in question and a viewing of the film by the Court, counsel and the defendant.

The policeman testified that he had viewed the film and then obtained a search warrant directing the seizure of the said film and projector. He further testified that several days later he returned and executed the warrant seizing the film and projector, and arrested the defendant in the premises, and then described the premises and the location of the machine and film therein.

This same policeman described the film in his Affidavit supporting the application for a search warrant as follows;

The subject in this film is a white female, with long brown hair, and about 25 years of age. She appears wearing white panties and black pantie hose. She massages her breasts with her hands and then

removes the hose. She then licks her breasts as she holds them with her hands and then she removes her panties. She then spreads her legs and the camera comes in close on her pubic area. She then picks up a banana and places it in her mouth simulating oral copulation. She then places the banana between her breasts and squeezes her breasts together and massages them with her hands. As she is doing this she moves her hips, with her legs spread, in a manner suggesting an invitation to sexual intercourse. She then again licks her breasts with her tongue and occasionally massages them to the end of the film.

The trial court accepted the ruling of the Judge who had denied the Motion to Suppress and that an adversary hearing was not necessary. The trial judge stated that he found the picture in question to be hard core pornography per se and therefore the government did not have to offer any proof of National Community Standard.

REASONS FOR GRANTING THE WRIT

1. The trial court should have dismissed the charge against the Petitioner because an adversary hearing was not afforded. The position of the government was that it was not possible for them to provide such a hearing as the film was only viewed by the police and not purchased by them. This argument by the government was not sound because they have now adopted a procedure by which they notify the operator or owner that a film might be obscene and that they desire to have an adversary hearing on a certain date at a certain court room and that if they do not produce the said film a warrant will be applied for. In each instance that this method has been used the recipient of such a message has responded and there have been adversary hearings. *Quantity of Books v. Kansas*, 84 Supreme Court 1723, *Drive-In Theatres v. Husky*, 305 F.

Supp. 1232, 435 F.2d 228, *Marcus v. Search Warrants*, 367 U.S. 717.

2. The District of Columbia Court of Appeals in two cases decided in December 1969, *Huffman v. United States*, 259 A.2d 342 and *Morris v. United States*, 259 A.2d 337, has adopted the law of the State of Maryland which states that if a trier of the facts finds that the material is hard core pornography per se that then the government does not have to prove any Community Standard but that the burden shifts and the accused must prove that the Community Standard does not find the instant film obscene. It is respectfully urged to this Court that this should not be the law for the District of Columbia and that the burden of proving the Community Standard should remain with the government.

Justice Frankfurther in *Smith v. California*, 361 U.S. 147, "... the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience in life, but on the basis of 'contemporary community standards.' "

Chief Judge Harold H. Green, in *U.S. v. Nardone*, Criminal Action No. 5156-65, then District of Columbia Court of General Sessions, now Superior Court of the District of Columbia, stated that he had his own personal standards and also a general opinion regarding community standards but he did not believe that his private views and opinions should be determinative. He stated, "To proceed on the assumption that the trier of facts–particularly a judge sitting without a jury–should decide on the guilt of an accused in a criminal case on the basis of his personal opinion concerning the acceptability of a certain film, book, or performance, without having heard any evidence whatever on the question, is to substitute judicial censorship for censorship by the police. Censorship–particularly censorship unfettered by

any restraints or safeguards–When there is no evidence, there is nothing for an appellate tribunal to review, unless the appellate judges were to substitute their personal opinions for the personal opinion of the trial judge.–is repugnant to the First Amendment, whether the censor wears a uniform or a robe.

"When evidence on contemporary community standards is supplied, the judge can decide the case in the customary judicial manner, based upon that evidence. But when there is no evidence–in that respect, the community standards question is unlike the prurient appeal question. Conceivably that question could be decided on the basis of the physical evidence along–on the critical issue, the judge could reach a decision only by relying upon his own predilections and prejudicies. When a judge condemns without evidence he is acting not as a court of law but as a censor. I decline to accept that role which the government would thrust upon me."

The film involved in Nardone were all of the same general nature, a nude woman going through certain dances, certain girations and suggestive posturing. The pictures it is submitted were in the same category as the film in this case.

The U.S. Court of Appeals for the Ninth Circuit, *Pincus v. Peter Pelchess*, Sheriff of Los Angeles County, California, 429 Federal Reporter 2nd 416, in reversing a conviction of selling obscene material on June 29, 1970, (Cert. granted and judgment affirmed without opinion November 25, 1970) decided that to display the nude human female form with neurotic overtones involving masterbation by the female who was alone and nude. That film was worse than the photographs in *Huffman v. U.S.*, No. 4924, and the dance performed in *Morris v. U.S.*, No. 4940.

It is respectfully submitted that the doctrine laid down in Huffman & Morris by this Court is inconsistent with the Pincus case which the Supreme Court of the United States affirmed without opinion.

3. This Court in *Miller v. California*, 37 L.Ed 2nd 419, stated on page 430 "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." The Court cited Oregon laws concerning obscenity, stated that Oregon had specifically defined the conduct that was forbidden by the statute. The Oregon statute sets out certain definitions which are not done in the District of Columbia statute. The Oregon statute among other things states as follows:

OBSCENITY AND RELATED OFFENSES

167.060 Definitions for ORS 167.060 to 167.095. As used in ORS 167.060 to 167.095, unless the context requires otherwise:

District

* * * * *

(6) "Obscene performance" means a play, motion picture, dance, show or other presentation, whether pictured, animated or live, performed before an audience and which in whole or in part depicts or reveals nudity, sexual conduct, sexual excitement or sado-masochistic abuse, or which

includes obscenities or explicit verbal descriptions or narrative accounts of sexual conduct.

(7) "Obscenities" means those slang words currently generally rejected for regular use in mixed society, that are used to refer to genitals, female breasts, sexual conduct or excretory functions or products, either that have no other meaning or that in context are clearly used for their bodily, sexual or excretory meaning.

* * * * *

(9) "Sado-masochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(10) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(11) "Sexual excitement" means the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

[1971 c.743 §255]

The District of Columbia statute not having the definitions of the Oregon statute allows each member of the police department to make his own individual conclusion as to what is obscene or not. New officers have no guidelines and rely on what older officers tell them as to what the statute means. This allows each individual officer in any given instance to decide on the

scene if a violation had occured according to what he had heard. The dangers inherit from such a procedure are to obvious to require numeration. It is well established that any law that leaves to an individual officer the undefined latitude to judge conduct, particularly in the realm of morality, without a fixed standard, is inconsistent with elementary concepts of due process.

This Court in *Papachistou v. City of Jacksonville*, 405 U.S. 156 stated that the ordinance in that case was void for vagueness, in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and because it encourages arbitrary and erratic arrests and convictions. Living under a rule of law entails various suppositions, one of which is that "(all persons) are entitled to be informed as to what the state commands or forbids". 405 U.S. at 162.

The statute in this case is not so clearly and definitely expressed that a man or woman of common intelligence could determine in advance whether his or her contemplated conduct was within or without the law and further that it failed to provide explicit standards for those who apply and enforce the law, to prevent arbitrary and discriminatory enforcement.

This Court in *Roe v. Wade*, 410 U.S. 113 lead Chief Justice Burger to observe that "no one in these circumstances should be placed in a posture of dependence on a prosecutorial policy or prosecutorial discretion. Of course, States must have broad power . . . to regulate the subject of abortions, but where the consequences of state intervention are so severe, uncertainty must be avoided as much as possible."

In the case of *Detco, Inc. v. McCann*, U.S.D.C. E. Wis. by three Judge Court decided on October 19, 1973 relying on *Miller v. California, supra.* stated a new

formula was designed to provide for standards more concrete and specific than those of the past and to alleviate the problems posed by the void-for-vagueness doctrine and the requirements of notice. Thus, the dictates of *Miller*, especially the specificity requirement, are likely to sound the death knell for the Wisconsin obscenity statute as it is presently construed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Washington, D.C. 20001
Counsel for Petitioner
James Jay Kaplan

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5452

James Jay Kaplan, Appellant,

v.

United States, Appellee.

Appeal from the District of Columbia
Court of General Sessions*

(Argued April 6, 1971 Decided May 10, 1971)

H. Clifford Allder for appellant.

William H. Schweitzer, Assistant United States Attorney, with whom *Thomas A. Flannery*, United States Attorney, *John A. Terry* and *Roger E. Zuckerman*, Assistant United States Attorneys, were on the brief, for appellee.

Before Hood, Chief Judge, Kern and Gallagher, Associate Judges.

KERN, *Associate Judge:* Appellant appeals from a judgment of conviction for presenting an obscene film[1]

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*Now the Superior Court of the District of Columbia.

[1] D.C. Code §22-2001 (Supp. III, 1970) provides in pertinent part:

(a)(1) It shall be unlawful in the District of Columbia for a person knowingly–

....

(B) to present, direct, act in, or otherwise participate in the preparation or presentation of, any obscene, indecent, or filthy play, dance, motion picture, or other performance;

entered after a trial by the court without a jury. Prior to trial, the court upon an affidavit by a police officer had issued a search warrant for a film of some 12 minutes running time contained in a "peep-show" machine located in an "arcade" in downtown Washington. On the day after the warrant was executed and the machine and its reel seized, the court offered to hold a hearing on the validity of the issuance of the warrant, but appellant declined the offer.

At trial, the Government presented evidence consisting of the reel seized and the testimony by a police officer that appellant was working on the premises both on the day of the seizure and on a prior day when the officer had viewed the film there and that appellant had half-ownership of the arcade in which the machine in question as well as a number of others were located. The trial court found the film to be obscene per se and that there was no reason to reopen the question of the validity of the seizure of the peep show reel.

Appellant complains that the trial court failed (a) to apply prevailing national community standards before finding the film obscene and (b) to hold an adversary hearing prior to issuing the search warrant. He also contends that there was failure of proof that he knew the film being exhibited in this particular machine was obscene.

. . . .

(2)(B) For purposes of paragraph (1) of this subsection, the term "knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.

As to his contention of lack of *scienter*, there was evidence that appellant was working at the arcade on more than one occasion when the film was being displayed and had an ownership interest in the arcade. Such evidence is sufficient under the statute to show knowledge on his part. *Morris v. United States*, D.C. App., 259 A.2d 337, 340 (1969).

As to the Government's alleged failure to introduce at trial evidence of prevailing community standards, this court in *Morris v. United States, supra* at 341, adopted the Maryland definition of obscenity per se and we held there that:

> [W]here obscenity per se is involved, the prosecution is not required to offer any evidence (beyond the material or performance itself) that it is below the national community standards. *Womack, supra; Hudson, supra.* In other words if reasonable men could not differ and they could come to but one conclusion, *i.e.*, that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the Government on its case-in-chief need not offer any evidence of national community standards.

In this case, we have viewed the film,[2] and it is beyond question sexually morbid, grossly perverse and bizarre, and wholly without any artistic or scientific justification. The description of the film, contained in the memorandum opinion of the trial judge, which we attach

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[2] We are required to make "an independent constitutional judgment on the facts . . . as to whether the material involved is constitutionally protected." Jacobellis v. Ohio, 378 U.S. 184, 190 (1964).

hereto as an Appendix, is accurate, if somewhat understated. Its finding that the reel was obscene per se must be upheld under *Morris v. United States, supra,* and *Womack v. United States,* 111 U.S. App. D.C. 8, 294 F.2d 204 (1961).

We emphasize that the defendant in an obscenity prosecution, when the prosecution's theory is that the material is obscene per se, has the right always to introduce evidence to the trier of fact of prevailing community standards to prove that the material is not obscene per se. *See Morris v. United States, supra.* Appellant did not do so in this case.

Finally, we consider appellant's contention that he should have been granted a hearing prior to the issuance of the warrant directed to the peep show machine.[3] We note that the warrant was issued upon a detailed affidavit,[4] that only one machine out of a number was seized and that the machine contained a single 12-minute peep show reel. Moreover, a hearing on the propriety of the seizure was offered appellant the day after the

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[3] An adversary hearing before issuance of a search warrant is not required by the fourth amendment but when such search would curtail "constitutionally protected expression." *See* Quantity of Books v. Kansas, 378 U.S. 205, 210-11 (1964).

[4] The affidavit stated in part that:

> This movie is of a white female with long brown hair, about 25 yrs. of age. During this movie this female fondles her breast's [sic] with her hands, Licks her breast's [sic] with her tongue, Places a banana in her mouth and simulates oral copulation, and moves her body in a manner suggesting an invitation to sexual intercourse. It is submitted that the movie being exhibited in this panoram machine #20 at 514 9th St. N.W. is of an obscene, indecent, and filthy nature, and in violation of Title 22, D.C. Code, Section 2001 as amended by Section 606, Public Law 90-226.

seizure. Unlike books, magazines and theatre films there is a real and practical difficulty in viewing a peep show machine reel before seizing it. Law enforcement officials have no right to require the operator to bring the machine to the court and the court has no reason to go to the machine. We think the procedure followed under the particular circumstances of this case was reasonable. *See United States v. Wild*, 422 F.2d 24, 40 (2d Cir. 1970); *Bazzell v. Gibbens*, 306 F.Supp. 1057, 1059-60 (E.D.La. 1969); *Rage Books, Inc. v. Leary*, 301 F.Supp. 546, 551 (S.D.N.Y. 1969); *People v. DeRenzy*, 275 A.C.A. 419, 79 Cal. Rptr. 777 (1969) (holding that state law enforcement officers, acting under authority of a search warrant, may seize at least one copy of an alleged obscene book, film or other material when necessary for use in a later adversary proceeding, without doing violence to the first or fourth amendments). *But cf. Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1970) (affirming District Court's order that the film seized in *DeRenzy* be returned), *vacated and remanded*, 39 U.S.L.W. 3423024 (U.S. March 30, 1971), for reconsideration in light of *Perez v. Ledesma*, 39 U.S.L.W. 4214 (U.S. Feb. 23, 1971).

Affirmed.

APPENDIX

This film depicts a young female stripping absolutely naked, then brazenly and shamelessly displaying her breasts as well as her genitalia including the mons veneris. The sceneric background is meager and is designed in such a fashion as not to distract nor to interfere with the viewer's concentrated attention focused upon the camera's long shots, close-up shots and very-close-up shots of the female participant's genitalia and astronomically large breasts. The female filmed simulates passion;

and by her body movements, gyrations and undulations coupled with a banana, used as a phallic symbol and being larger than normally displayed for sale in the neighborhood food markets, suggests to the viewer that she is masturbating, orally copulating (i.e. fellatio) and seems most willing to engage in sex play culminating with sexual intercourse. The apparent highlight of this film footage is a close-in view of the female performer's vaginal area and with the aid of a banana used as a replica of the male sex organ in an erect state, she suggests to the viewer rather graphically the act of sexual intercourse. The film concludes with the woman peeling and devouring the banana—the gist of which is intended to be illustrative of the performer's desire to participate in osculatory relations with the private parts of a male.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 5452

James Jay Kaplan, Appellant,

v.

United States, Appellee.

Upon Remand from the United States Supreme Court

(Remanded June 25, 1973 Decided November 21, 1973)

H. Clifford Allder for appellant.

Harold H. Titus, Jr., United States Attorney, with whom *John A. Terry* and *William M. Brodsky*, Assistant United States Attorneys, were on the supplemental memorandum, for appellee.

Before Kern and Gallagher, Associate Judges, and Hood, Chief Judge, Retired.

PER CURIAM: The Supreme Court of the United States vacated the judgment this court had entered in this case on May 10, 1971, in an opinion reported at 277 A.2d 477, which had affirmed appellant's conviction for presenting an obscene film in a "peep-show" machine, and remanded the case for our further consideration in light of its recent decisions dealing with obscenity. *See* 93 S. Ct. 3030 (1973).

After reviewing the record and briefs filed at the time of the argument and considering the supplemental memoranda we permitted the parties to file after the Supreme Court's mandate to us and the decisions cited in such mandate we reinstate our judgment affirming appellant's conviction for violation of D.C. Code 1973, §22-2001 and reaffirm our prior opinion.

So ordered.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 71-40

James Jay Kaplan,

Petitioner,

v.

United States

ON WRIT OF CERTIORARI to the District of Columbia Court of Appeals.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said District of Columbia Court of Appeals in this cause be, and the same is hereby, vacated; — and that this cause be, and the same is hereby, remanded to the District of Columbia Court of Appeals — for further consideration in light of Miller v. California, ____ U.S. ____ (1973); Paris Adult Theatre I v. Slaton, ____ U.S. ____(1973); Kaplan v. California, ____ U.S.____ (1973); U.S. v. 12 200-ft. Reels of Super 8mm Film, ____U.S. ____(1973); U.S. v. Orito, ____U.S. ____(1973); Heller v. N.Y., ____ U.S. ____(1973); Roaden v. Ky., ____U.S.____(1973); and Alexander v. Virginia, ____U.S.____(1973).

June 25, 1973